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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 470

JANEL SALES CORP. and CARLTON DRUG, INC.,
Petitioners,

—against—

LANVIN PARFUMS, INC., by change of name LANVIN-CHARLES OF THE RITZ, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the United States District Court for the Southern District of New York, Inzer B. Wyatt, District Judge, appears on pages 814 to 833 of the appendix filed below and submitted herewith and appears at pages 19a to 31a *infra*. The opinion of the Court of Appeals for the Second Circuit appears at pages 1a to 18a *infra*.

Jurisdiction

The judgment of the Court of Appeals was dated and entered June 5, 1968.

Jurisdiction of this Court is invoked under the provisions of 28 USC 1254(1).

Questions Presented

1. Does the McGuire Act sanction enforcement of Fair Trade pricing by injunction as between firms in competition with each other?

2. Does the use of state process for obtaining and enforcing injunctions create an immunity as to antitrust damage claims resulting therefrom, even though the use of such state process is in contravention of affirmative federal standards?

3. Is the legality of a customer limitation clause in a formal Fair Trade contract to be judged independently, and without reference to the propriety and lawfulness of the Fair Trade contract to which the customer limitation clause is ancillary?

Statutes Involved

The Statutes involved are Section 1 of the Sherman Antitrust Act, 15 USC Sec. 1, and the McGuire Act amendment to the Federal Trade Commission Act, 15 USC Section 45(a)(2)-(a)(5).

Statement

Each of the corporations that were parties plaintiff and are petitioners herein, operates a retail drug store featuring cut prices on well-known branded products. Defendant, respondent herein, is an established firm in the perfume and cosmetic industry, importing certain of its products

from France and offering all of its products as prestige items at relatively high prices. Respondent sells directly to retail outlets, to individuals and to other businesses at 40% off the list price. Respondent does not employ wholesalers in the marketing of its products.

Respondent also operates a Fair Trade program in the various states of the United States where Fair Trade laws are available to it, including the State of New York. Each retailer of respondent's products purchases directly from respondent and in New York is required to execute a Fair Trade contract with respondent. The Fair Trade contracts of respondent contain, among other things, a customer limitation clause confining retailers to sales to consumers only.

Petitioners have in the past obtained small quantities of respondent's Fair Traded products for resale by the process of diversion; that is purchasing from retailers with whom respondent did business. Petitioners sold such products to consumers at prices lower than the Fair Trade price set by respondent. Fair Trade injunction suits pursuant to State law were brought against petitioners by respondent, injunctions issued, and said injunctions have been enforced by means of substantial penalties. As the State courts are without jurisdiction to enforce Federal antitrust limitations, petitioners' McGuire Act defenses offered in the State courts were of no avail to them.

In July of 1963, petitioners filed their complaints against respondent charging violations of the Sherman Antitrust Act, 15 USC Sec. 1, alleging that respondent's Fair Trade contracts were unlawful as not being immunized by the McGuire Act, 15 USC Sec. 45(a)(2)-(5); that respondent's enforcement of its Fair Trade price structure against petitioners was unlawful; and that respondent had enforced a boycott as to petitioners by means of the customer limitation clause in its Fair Trade contracts.

On the trial of the consolidated cases in September 1967, it was established beyond dispute and by more than 4,000 of respondent's invoices, that respondent had sold substantial quantities of its products directly to consumers, some of whom were petitioners regular customers, at 40% off Fair Trade prices—at the same time it enforced its Fair Trade pricing structure against petitioners. (A48-A295, A349-A447)* A retail sales tax was collected by respondent as to the majority of these transactions.

Such selling by respondent of its products directly to consumers was not insignificant—such sales amounted to about 7% of its annual volume in New York City during the period covered by the complaint. Such sales were not sporadic, but rather were consistent and continuous, and were made to consumers in the vicinity of petitioners' stores and, indeed, to some customers of petitioners whose offices were in the same building as petitioners' stores. (A29-A30)

Jacob Rothman, an officer of plaintiff corporation, testified (A311):

> Q. I show you this one taken from Plaintiffs' Exhibit 11 in evidence and ask you to identify that one.
>
> A. This is dated June 14, 1962, Pop's Textiles Company, 488 Seventh Avenue, New York City, 30 pieces, $49.80, city sales tax $1.49, total $51.29.
>
> Q. I ask you, Mr. Rothman, you notice on these exhibits you just read from, Pop's Textiles, where is that in relation to the building in which your store is located?
>
> A. He has an office in that building.

Thus, it has been petitioners' consistent position throughout that respondent, by engaging in the retail selling of its products to consumers, was in fact in competition with

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* The references are to the Appendix in the Court of Appeals submitted herewith.

petitioners and was thus not permitted by law to utilize the limited privilege of Fair Trade, and that respondent's enforcement of its Fair Trade contract as against petitioners was without legal foundation. It was petitioners' further position that the contractual arrangements between respondent and its retail customers, having the obvious purpose and effect of depriving petitioners of access to respondent's products, even after the sale by respondent to its customers, constitutes an unwarranted restraint on alienation, and unreasonable restraint of trade adopted and enforced for the sole purpose of implementing the retail price-fixing program of respondent.

Jacob Rothman described one such incident (A324):

A. I went to Brittany Chemists, 9th Street and Broadway.

Q. What did you go there for?

A. I asked him to sell me Lanvin. I live near the store.

Mr. Keefe: I object.

The Court: Overruled. Go ahead.

A. He said he could not sell me any.

I said "Why not?"

He said "I signed a contract. If I sell it to anyone else, I will lose the line, and the line is too valuable for me to play around with it."

All sales by respondent to consumers, some of whom were customers of petitioners, were uniformly at 40% off respondent's fixed Fair Trade prices (A21). The anomaly of respondent's enforcement of its Fair Trade program against petitioners, compelling petitioners by legal process to adhere to the prices fixed by respondent, while at the same time respondent is actively engaged in selling to the same class of consumers in competition with petitioners at 40% off respondent's Fair Trade prices, is palpable.

In the District Court, the issue relating to respondent's retail transactions was taken from the jury and judgment issued thereon in favor of respondent. The customer limitation—boycott issue was tendered to the jury with a conspiracy charge (A33) and the jury found in favor of respondent thereon.

On October 19, 1967 respondent appealed. On June 5, 1968, the Court of Appeals affirmed the judgment of the District Court as to the customer limitation—boycott issue, and reversed and remanded the cause, limited to the issue relating to respondent's retail activities.

REASONS FOR GRANTING THE WRIT

1. The proper construction of subsection (5) of the McGuire Act, 15 USC Sec. 45 (a) (5), is of practical importance to the bar and to the Courts in the administration of a substantial volume of fair trade litigation.

The cases referred to in the opinion of the Court of Appeals illustrate the varying constructions of Subsection (5) of the McGuire Act now prevalent. Is the limitation of Subsection (5) to be confined to the exemptions as set out in Subsection (2), and with no application to Subsection (3)? In other words, does the mandate of Subsection (5) relate only to those who are parties to a Fair Trade contract, to the exclusion of non-signers?

In this case, the trial court rendered judgment after taking the question from the jury as to whether or not the respondent's activities made it a retailer. The Court of Appeals, in reversing and remanding, committed substantial error by stating that "the first question of fact is whether Lanvin is functionally a retailer". It has

been petitioners' position throughout that the proper question for the trier of fact is "are petitioners and respondent in competition with each other".

Other constructions of Subsection (5) now employed by the courts are to the effect that the phrase "in competition with each other" modifies the word "retailers", so that before Subsection (5)'s limitation of Subsections (2), (3) and (4) can become operative:

(a) A retailer must be in competition with the Fair Trade plaintiff, and

(b) The retailer must be party to a formal Fair Trade contract.

These constructions are now employed to exclude nonsigners against whom Fair Trade enforcement is obtained from recourse to Subsection (5) of the McGuire Act.

It is respectfully submitted that such constructions are unwarranted, both in terms of the legislative history of the Federal Enabling Acts and of the prior decisions of this Court, *U. S.* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, and *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384.[1]

It is respectfully submitted that this petition provides a timely opportunity for this Court to clarify the scope and application, in practical circumstances, of the exemption granted by the McGuire Act Amendment to the Federal Trade Commission Act, and the limitation of such exemption.

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[1] The Court of Appeals distinguished McKesson & Robbins by stating: "However, the Court was concerned with competing signers.".

2. It need be made clear that federal antitrust standards are sovereign and not subject to a "Reverse Pre-Emption" on the grounds of comity or otherwise.

On the trial of the action respondent urged the doctrine of collateral estoppel, predicated on its state court successes in obtaining and enforcing injunctions against these petitioners. The District Court properly refused this argument, tendered as a bar to federal prosecution under the Sherman Act. The issue was not briefed or argued or alluded to in any manner before the Court of Appeals. Yet in a footnote to its opinion, the Court of Appeals stated:

> "Of course, there can be no damages arising from the state court injunction, even if the issuance of it was in error. Plaintiffs' remedy for an erroneous state court decision rests in the state courts. See *Digaetano* v. *Texas Co.*, 300 F. 2d 895 (3 Cir. 1962); *Fiumara* v. *Texaco Inc.*, 204 F. Supp. 544 (E. D. Pa.), aff'd 310 F. 2d 737 (3 Cir. 1962)."

It is palpable that State courts are without jurisdiction to entertain Federal based antitrust claims; neither are the opinions and judgment of State tribunals as to Federal antitrust issues authoritative. It is also apparent that State courts have no jurisdiction to confer immunity, indirectly or otherwise, on litigants as to any liabilities which have their basis in Federal law. To view the matter otherwise would give rise to a doctrine of State preemption that is alien and repugnant to established principles of Federal sovereignty.

As a practical matter, this footnote, although unsolicited, deprives petitioners of much of the damage predi-

cate needed to sustain their antitrust claims. It tends to remand them to the posture of strangers or bystanders without a damage nexus to the events in question.

It should not be the law that a Fair Trader can enforce an unlawful price fixing scheme, even to the point of obtaining substantial contempt of court penalties against petitioners, then exculpate itself from liability to petitioners for its wrongdoing on the incidental ground that state process was employed in the course of the wrongdoing.

The doctrine of State pre-emption as relating to a basic and pervasive Federal policy is disconcerting and potentially mischievious; the Court is respectfully urged to employ its supervisory jurisdiction in this case in the protection and vindication of Federal antitrust policy.

The prospect facing petitioners of retrying its case limited to the retailer issue, subject to the harsh discipline of the quoted footnote, albeit dicta, is most uninviting.

3. The Customer limitation clause of the respondent's fair trade contract can be properly considered only in the light of the legality of the price fixing scheme as applied to these petitioners and should be held illegal *per se* in a Sherman Act case.

In *U. S.* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, this Court held that post-sale restrictions relating to the parties to whom a product may be resold, are illegal *per se*. On the trial of this cause, petitioner requested this charge to the jury (A448 et seq.). The District Court refused to give the charge as requested, and instead, submitted the matter to the jury on a conventional conspiracy charge, eliciting from petitioners' counsel a statement that the Court's instruction was proper. There is nothing in

the record to suggest that petitioners' counsel agreed that the Court's charge should be substituted for petitioners' requested charge, and, in a general sense, the charge made to the jury was not objectionable, it was simply inadequate and incomplete.

The Court of Appeals erroneously decided the issue presented by imposing a condition precedent on the application of Schwinn to the facts of this case; such condition being that the enforcement of the offending customer limitation clause must be "firm and resolute". The Court of Appeals also relied upon the narrow technicality of the failure of petitioners' counsel to object to the charge, and the Court of Appeals also referred to the defense of respondent that the clause was meaningless and not enforced.

By such reasoning petitioner is deprived of the boycott features of its cause of action. This treatment of the issue by the District Court and the Court of Appeals not only precludes petitioners from a retrial on the boycott issue but is also in derogation of the standards set out in *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707.

It is respectfully submitted that the customer limitation clause (A298) is

a) Under Schwinn standards, illegal per se, and

b) Under Bausch & Lomb standards, would be illegal as part of an entire and unlawful resale price maintenance arrangement.

Since the judgment of the Court of Appeals is final and conclusive on the boycott aspects of petitioners claim, such would not be involved in the remand. Customer limitation clauses of similar import are widespread, being

employed by many firms engaged in franchising as well as Fair Trading, and are thus of sufficient import to merit the attention of this Court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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